

No. 77-1282

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

SERVICE ARMAMENT CO., PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that its replicas of antique firearms, which are capable of discharging projectiles, are not subject to the federal excise tax that 26 U.S.C. 4181 imposes on "firearms."

Petitioner manufactures and imports replicas of muzzle-loading antique firearms. The replicas may be fired by inserting powder and a projectile in the barrel, and igniting the powder with a flint or cap (Pet. App. 1a-2a).

The Commissioner of Internal Revenue determined that petitioner was liable for the excise tax on the sale of firearms by a manufacturer or importer imposed by 26 U.S.C. 4181, which is contained in Chapter 32 of the Internal Revenue Code of 1954 (Pet. 6). Chapter 32 does not define the term "firearms," but the term is defined in Treasury Regulations on Manufacturers and Retailers

Excise Taxes, 26 C.F.R. 48.4181-2(c), to mean "any portable weapons * * * from which a shot, bullet, or other projectile may be discharged by an explosive." Petitioner does not dispute that this definition covers its products, but contends that the regulation is inconsistent with the statute because other provisions in the tax code and the criminal code expressly exempt antique firearms and their replicas from those provisions.

Petitioner paid the tax and brought this refund suit in the Court of Claims. The court sustained the Commissioner's determination (Pet. App. 1a-10a). The court noted that the definitional regulation was first promulgated in 1935, and that Congress, in reenacting Section 4181, did not provide a contrary statutory definition; it concluded that this regulation "must be deemed to have received Congressional approval" (Pet. App. 8a).

In addition, the court noted that the express statutory exclusion of antique firearms and replicas from the definition of "firearms" in 26 U.S.C. 5845 and its predecessors was limited to Chapter 53 of the Internal Revenue Code (Pet. App. 4a-7a) and was intended to relieve antique gun collectors from registration and transfer requirements otherwise imposed by that chapter. The court also rejected petitioner's arguments that its products are exempt because (1) they are not used for hunting and, therefore, their owners do not benefit from the wildlife restoration projects financed by the proceeds of the firearms excise tax, and (2) they do not use shells and cartridges subject to the tax on ammunition under Section 4181 (Pet. App. 8a-10a).

The decision below is correct and there is no conflict or other reason for this Court's review.

1. The Secretary's definition of "firearms" under Section 4181 to include all portable weapons capable of firing projectiles by explosives is reasonable; it has been consistent and long-standing;¹ and Congress has reenacted the relevant statute without change. In those circumstances, the Secretary's definition "should not be overruled except for weighty reasons." *Commissioner v. South Texas Lumber Co.*, 333 U.S. 496, 501. See also *Saxbe v. Bustos*, 419 U.S. 65, 74; *Bingler v. Johnson*, 394 U.S. 741, 749-750.

Petitioner has advanced no such reasons. The fact, relied on by petitioner, that other statutory provisions (18 U.S.C. 921 and 26 U.S.C. 5845) expressly exclude replicas of antique firearms from the coverage of their respective chapters² (which do not include Section 4181) does not support petitioner. To the contrary, Congress' failure to make a similar exemption in Section 4181 suggests a legislative intent that antiques not be excluded from that section and that the term "firearms" there was intended to have a broader scope.

In any event, as the Court of Claims noted, the purposes of Section 4181 are different from those of 26 U.S.C. 5845 (part of the National Firearms Act of 1934) or 18 U.S.C. 921 (part of the Gun Control Act of 1968). As its history reflects, Section 4181 has always been an excise tax designed to raise revenue (see Pet. App. 7a). The principal purpose of the National Firearms Act, on

¹As the Court of Claims noted (Pet. App. 8a), not only was the definitional regulation promulgated in 1935 but also a revenue ruling issued in 1957 stated that antique firearms "are subject to the manufacturers excise tax imposed by section 4181 of the Code." Rev. Rul. 57-606, 1957-2 Cum. Bull. 733.

²18 U.S.C. 921(a) commences "[a]s used in this chapter—" and 26 U.S.C. 5845 commences "[f]or the purpose of this chapter—."

the other hand, was to make it "more difficult for the gangster element to obtain certain types of weapons." S. Rep. No. 1303, 86th Cong., 2d Sess. 2 (1960). In furtherance of that purpose, the Act includes requirements for the registration of firearms, and various prohibitions on transfers, alterations and so forth. As the Court of Claims noted (Pet. App. 6a), Congress' amendment of the Firearms Act in 1954 to exclude antiques and replicas was intended to relieve antique gun collectors and dealers from restrictions that were unnecessary in view of that Act's principal purpose.³

Similarly, as this Court has recognized, the Gun Control Act of 1968 was also designed to control firearms for law enforcement purposes; the Act "sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous." *Barrett v. United States*, 423 U.S. 212, 218. The fact that Congress in the National Firearms Act and the Gun Control Act did not view antique firearms and their replicas as presenting significant law enforcement problems does not suggest that Congress intended to exclude those articles from a purely revenue raising statute.

³There is no basis for petitioner's assertion (Pet. 14) that the excise tax imposed by Section 4181 and the National Firearms Act of 1934 have "common roots." The excise tax was first enacted in 1918. Moreover, the Senate Report on the National Firearms Act states, in connection with the definition of firearms contained in the predecessor of Section 5845, that the taxes imposed by the Firearms Act (of which Section 5845 is a part) "are wholly separate from the * * * taxes applying to the manufacturer's or importer's sale of pistols, revolvers, and other ordinary firearms (sec. 4181)." S. Rep. No. 1303, *supra*, at 2.

Petitioner's reliance (Pet. 17) on *Sonzinsky v. United States*, 300 U.S. 506, is also unfounded. In upholding the constitutionality of the National Firearms Act as within the taxing power, the Court made clear that it was not basing its decision on the underlying purpose of the statute.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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